

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

\* \* \*

URBAN OUTFITTERS, INC.,

Plaintiff,

v.

DERMODY OPERATING COMPANY,  
LLC, *et. al.*,

Defendants.

Case No. 3:21-cv-00109-MMD-CLB

**ORDER GRANTING MOTION TO STAY  
DISCOVERY**

[ECF No. 31]

Currently pending before the Court is Defendant Dermody Operating Company, LLC's ("Dermody") motion to stay discovery, (ECF No. 31), which was joined by Defendant United Construction Co. ("United") (collectively "Defendants"), (ECF No. 32). Plaintiff Urban Outfitters, Inc. ("Urban"), responded to the motion, (ECF No. 35), and Defendants replied. (ECF Nos. 39, 40.) The Court has reviewed the relevant pleadings and papers, and, for the reasons set forth below, the motion to stay is granted.

**I. BACKGROUND**

**A. FACTUAL SUMMARY**

In 2011 Urban contracted with Defendants to build a distribution and fulfillment center located at 12055 Moya Boulevard, Reno, Nevada ("the Site"). (ECF No. 1 at 1-3.) Defendants agreed to develop, design, and construct the center consisting of a building containing approximately 462,720 square feet, associated driveways, parking areas, landscaped areas, on-site utilities and facilities, and ancillary improvements on the Site. (ECF No. 1-1 at 14.) The building was constructed between 2011 and 2012, and Urban was provided a "Certificate of Occupancy" on February 2, 2012. (*Id.* at 69.)

1 Urban claims it later became aware of alleged construction defects on the Site.  
2 Starting in April 2019, Urban alleges it experienced problems with the roof and its assembly.  
3 (*Id.* at 50.) Subsequently, Urban claims it identified additional construction defects on the  
4 Site, which included: (1) heaving, settlement and cracking of the asphalt and concrete  
5 paving in and around the truck dock area; (2) structural failure of the exterior stairs and  
6 bollards; and (3) cracking and vertical displacement of the southwest corner of the docking  
7 bay structure including interior and exterior cracking of various building components. (ECF  
8 No. 1 at 9.) Urban claims the origins of these issues are related to the original construction,  
9 and it will have to pay for various repairs. (*Id.* at 9-11.)

## 10 **B. PROCEDURAL HISTORY**

11 On March 3, 2021—approximately 9 years after the construction was completed—  
12 Urban filed a complaint against Defendants. (ECF No. 1.) Urban asserts various claims  
13 against Defendants such as breach of contract, breach of covenant of good faith and fair  
14 dealing, negligence, and breach of express warranties, which arise from the alleged  
15 defective construction of the Site. (*Id.* at 11-16.)

### 16 **1. MOTIONS TO DISMISS**

17 In response to the complaint, United and Dermody each filed a motion to dismiss for  
18 failure to state a claim. (ECF Nos. 10, 12.) In both motions, Defendants argue Urban's  
19 claims must be dismissed because: (1) the claims in the complaint are precluded by  
20 Nevada's 6-year statute of repose; (2) these claims were not revived by the Nevada  
21 Legislature's 2019 amendment to NRS 11.202, which extended the repose period to 10  
22 years; (3) Urban's contract claims are precluded by Nevada's 6-year statute of limitations;  
23 and (4) the negligence claim is barred by the economic loss doctrine. (ECF No. 10 at 9-17;  
24 ECF No. 12 at 4-15.)

25 In support of its motion to dismiss, Dermody also filed a "Request for Judicial Notice,"  
26 which appended several public records, which United joined. (ECF Nos. 13, 14, 17.) These  
27 documents include: (1) United's building permits for the different elements of construction,

1 dated June 28, 2011, August 2, 2011, May 19, 2011, and July 15, 2011; (2) the “Certificate  
 2 of Substantial Completion” for the Site issued on February 2, 2012; and (3) the “Certificate  
 3 of Occupancy” for the Site issued on February 2, 2021. (ECF Nos. 14, 13-2, 13-3.) These  
 4 documents, if judicially noticed, are critical in that they trigger the “substantial completion  
 5 date” as defined by Nevada’s statute of repose. (ECF No. 10 at 12.)<sup>1</sup>

6 On April 16, 2021, Urban opposed both motions to dismiss. (ECF Nos. 20, 22.) In  
 7 response to both motions, Urban argued: (1) the 2019 Amendments to Nevada’s statute of  
 8 repose, which extended the period from 6 to 10 years, retroactively applies to this case and  
 9 therefore the case was filed within the repose period; (2) the retroactive application of the  
 10 statute does not deprive Defendants of substantive rights; (3) retroactive application  
 11 preserves Urban’s claims under a rational basis approach; and (4) the economic loss  
 12 doctrine does not apply to Urban’s negligence claim because the Defendants are not design  
 13 professionals. (ECF No. 20 at 16-22; ECF No. 22 at 11-18.)

14 In response to United’s motion to dismiss, Urban also argued that, in the alternative  
 15 to dismissal, Urban should be granted leave to amend the complaint to add a new  
 16 defendant, GAF Materials, Inc. (“GAF”) and additional claims of fraud against United and/or  
 17 Dermody. (*Id.* at 22-23.)

## 18 **2. MOTION TO STAY AND MOTION TO AMEND**

19 On May 19, 2021, Dermody filed a Motion to Stay Discovery, which United joined.  
 20 (ECF Nos. 31, 32.) Dermody argues discovery should be stayed because: (1) the pending  
 21 motions to dismiss are dispositive of the entire case; (2) ruling on the motions does not  
 22 require discovery; and (3) a “preliminary peek” of the motions demonstrates Defendants’  
 23 motions to dismiss will likely be granted. (ECF No. 31 at 5-6.)

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 25 <sup>1</sup> Attached as “Exhibit A” to Urban’s Complaint is “Exhibit A-5, Appendix A”, (ECF No.  
 26 1-1 at 65-76), which is a letter prepared by Madsen, Kneppers & Associates that expressly  
 27 states the “Certificate of Occupancy” was received by Urban on February 2, 2012. (ECF No.  
 1-1 at 69.) This document, along with all other documents that constitute “Exhibit A,” was  
 attached to the Complaint. (See ECF No.1 at 17) (table of exhibits.)

1 In response to the motion to stay, Urban filed two documents. (ECF Nos. 34, 35.)  
2 First, Urban filed a motion for leave to amend the complaint. (ECF No. 34.) Urban claims it  
3 filed the motion for two reasons: (1) to comply with the Local Rules for requesting leave to  
4 file an amended complaint; and (2) to further explain and elaborate on the basis for the  
5 requested amendment it previously asserted in its opposition to United's motion to dismiss.  
6 (*Id.* at 1, 4.) Urban's requested amendment seeks to add claims for: (1) fraud, deceptive  
7 trade practices and civil conspiracy against United and GAF; (2) civil aiding and abetting  
8 against GAF; and (3) to expand its allegations related to its breach of contract claim against  
9 United. (*Id.* at 5-8.)

10 In addition, Urban filed an opposition to the motion to stay. (ECF No. 35.) In the  
11 opposition, Urban argues the motion to amend moots Defendants' motion to stay.  
12 According to Urban, if the motion to amend is granted, the new claims for deceptive trade  
13 practices, fraud, civil conspiracy, and civil aiding and abetting claims are not precluded by  
14 the statute of repose and therefore a stay is not warranted. (*Id.* at 2.)

15 Dermody replied on May 28, 2021, which United also joined. (ECF Nos. 39, 40.)  
16 Defendants argue the motion to stay should be granted because: (1) Urban failed to oppose  
17 the motion to stay because it failed to address any of the substantive arguments raised in  
18 the motion; and (2) the motion to amend does not "moot" the motion to stay as to Dermody  
19 because none of the new claims in the proposed amended complaint are asserted against  
20 Dermody and thus all the claims asserted against Dermody remain subject to dismissal  
21 pursuant to the statute of repose. (ECF No. 39 at 2-4.)

## 22 **II. LEGAL STANDARD**

23 To determine if a stay is appropriate pending the ruling on a motion to dismiss, the  
24 court considers the following factors: (1) whether the pending motion is potentially  
25 dispositive of the case; (2) whether the motion can be decided without additional discovery;  
26 and (3) whether the court is convinced that the plaintiff cannot state a claim for  
27 relief. *Tradebay, LLC v. eBay, Inc.*, 278 F.R.D. 597, 603 (D. Nev. 2011); *Kor Media Group*,

1 *LLC v. Green*, 294 F.R.D. 579, 581 (D. Nev. 2013); *First Am. Title Ins. Co. v. Commerce*  
 2 *Assocs., LLC*, No. 2:15-cv-832-RFB-VCF, 2015 WL 7188387, at \*2 (D. Nev. Nov. 13,  
 3 2015). The court must take a “preliminary peek” at the merits of the underlying dispositive  
 4 motion in order to find whether the plaintiff can state a claim. *Tradebay*, 278 F.R.D. at  
 5 603. The “preliminary peek” does not prejudice the outcome of the motion; it merely  
 6 evaluates whether an order staying discovery is warranted. *Id.*

7 In conducting its review, the court also considers the goal of Federal Rule of Civil  
 8 Procedure 1, which provides that the Rules should “be construed, administered, and  
 9 employed by the court and the parties to secure the just, speedy, and inexpensive  
 10 determination of every action.” Fed. R. Civ. P. 1. With Rule 1 as its prime directive, the court  
 11 must decide whether it is more just to speed the parties along in discovery while a dispositive  
 12 motion is pending or to delay discovery to accomplish the inexpensive determination of the  
 13 case. See *Big City Dynasty v. FP Holdings, L.P.*, 336 F.R.D. 507, 512 (D. Nev. 2020).

### 14 **III. ANALYSIS<sup>2</sup>**

#### 15 **A. DEFENDANTS’ MOTIONS TO DISMISS ARE DISPOSITIVE.**

16 Pursuant to the *Tradebay* factors, the Court must first determine whether Defendants’  
 17 motions to dismiss are potentially dispositive. Here, each motion primarily seeks dismissal  
 18 of the claims asserted against Defendants on the basis that the claims are precluded by the  
 19 applicable statute of repose. Nevada law imposes specific time limitations on claims arising  
 20 from alleged construction defects pursuant to a statute of repose. *Somerset Owners Ass’n*  
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22 <sup>2</sup> The Court rejects Urban’s contention that the filing of its “Motion to Amend” moots  
 23 the motion to stay. First, Urban sought to amend its complaint when it filed its opposition to  
 24 United’s motion to dismiss, which was filed prior to the motion to stay. (ECF No. 20 at 22-  
 25 23.) In addition, in Urban’s subsequent stand-alone motion to amend, it expressly states the  
 26 motion was filed to more fully elaborate on the arguments seeking amendment contained in  
 27 the opposition to dismiss and to comply with the Local Rules. (ECF No. 20 at 4.) Moreover,  
 a review of the proposed amended complaint does not add new the claims against Dermody  
 and thus does not alter the arguments Dermody raised in its motions to dismiss or stay. For  
 all these reasons, and to serve the purposes set forth in Fed. R. Civ. Pro. 1, the Court can  
 and should reach the substance of the motion to stay.

1 *v. Somerset Dev. Co., Ltd.*, --- P.3d ---, 2021 WL 3237184, at \*1-2 n.4 (Nev. July 29, 2021).  
 2 Unlike a statute of limitation, a statute of repose runs whether “a litigant has pursued his  
 3 rights diligently, but some extraordinary circumstance prevents him from bringing a timely  
 4 action.” *Lozano v. Montoya Alvarez*, 572 U.S. 1, 10 (2014). Thus, the statute of repose  
 5 continues to run no matter when the cause of action is discovered. *FDIC v. Rhodes*, 130  
 6 Nev. 893, 899 (2014). If a litigant does not bring a claim within the proscribed time-period,  
 7 the statute of repose extinguishes the claim as a matter of law. *Albano v. Shea Homes Ltd.*  
 8 *P’ship*, 634 F.3d 524, 536 (9th Cir. 2011).

9 If the motions to dismiss are granted, it appears most, if not all, of the claims asserted  
 10 in the complaint would likely be subject to dismissal pursuant to application of the statute of  
 11 repose. Moreover, to the extent the claims may not be precluded by the statute of repose,  
 12 Defendants argue in the alternative that the claims are still precluded by the applicable  
 13 statute of limitations and/or economic loss doctrine. Therefore, the Court finds Defendants’  
 14 motions to dismiss are potentially dispositive.

15 **B. NO DISCOVERY IS NEEDED TO DECIDE THE MOTIONS TO DISMISS.**

16 Next, the Court must determine whether additional discovery is necessary for a ruling  
 17 on the motions to dismiss. Defendants argue the motions can be decided without additional  
 18 discovery. (ECF No. 31 at 5-6.) Urban, however, argues that the motions could not be  
 19 decided without additional discovery. (ECF No. 47 at 37-39.) Specifically, Urban argues  
 20 discovery is needed to determine the date of “substantial completion” of the project which  
 21 triggers the date the statute of repose began to run in this case. (*Id.*) The Court rejects  
 22 Urban’s arguments and agrees with Defendants that discovery is not necessary for  
 23 resolution of the motions to dismiss.

24 Under Nevada law, the statute of repose begins to run upon “substantial completion”  
 25 of the construction project. NRS 11.2020. “Substantial completion” is defined by statute as  
 26 the date on which: “(a) [t]he final building inspection of the improvement is conducted; (b)  
 27 [a] notice of completion is issued for the improvement; or (c) [a] certificate of occupancy is

1 issued for the improvement, whichever occurs later.” NRS 11.2055(1). Contrary to Urban’s  
 2 arguments, it submitted documents in support of its Complaint which expressly state that it  
 3 received a “Certificate of Occupancy” on February 2, 2012. (ECF No. 1-1 at 69.) Moreover,  
 4 even if Urban did not include this information with the Complaint, Dermody filed a “Request  
 5 for Judicial Notice,” which appears to contain public records that contain documents relating  
 6 to the inspection dates of the property, the “Certificate of Occupancy”, and the “Certificate  
 7 of Substantial Completion.” (ECF Nos. 13, 14.) If the District Court takes judicial notice of  
 8 these public records, discovery is not needed to determine the date of “substantial  
 9 completion,” which Nevada law expressly defines as occurring on either: the date of the final  
 10 inspection, the date of the notice of completion, and/or the date the certificate of occupancy  
 11 is issued.<sup>3</sup>

12 **C. THE COURT IS CONVINCED THE MOTIONS ARE LIKELY TO BE**  
 13 **GRANTED.**

14 Finally, the Court must conduct a “preliminary peek” of the motions to dismiss to  
 15 determine whether a stay is warranted. In conducting this preliminary peek, it is the Court’s  
 16 duty is to ensure an inexpensive determination of this action, and delaying discovery would  
 17 prevent economic waste, since conducting discovery before the ruling on the motions to  
 18 dismiss would be futile. Having conducted this preliminary peek, the Court finds a stay is  
 19 warranted.

20 The crux of the issues presented in Defendants’ motions to dismiss are primarily  
 21 centered upon the application of Nevada’s statute of repose to Urban’s claims—i.e., what

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22 <sup>3</sup> A court may take judicial notice of a fact that is generally known and which is not  
 23 subject to dispute, and deemed authentic. Fed. R. Evid. 201; *Khoja v. Orexigen*  
 24 *Therapeutics, Inc.*, 899 F.3d 988, 999 (9th Cir. 2018). “[A] court may take judicial notice of  
 25 matters of public record without converting a motion to dismiss into a motion for summary  
 26 judgment.” *Id.* For purposes of this motion, this Court does not determine whether judicial  
 27 notice will be taken of these documents. Rather, for purposes of ruling on the motion to stay,  
 the Court simply notes that if the District Court takes judicial notice of these documents,  
 which is permitted under the Rules of Evidence and Ninth Circuit law, no discovery would  
 be necessary.



1 repose period applies and whether recent amendments to the repose period may be  
2 applied “retroactively” to revive claims that appear to have been previously extinguished.  
3 Based on the Court’s “preliminary peak” of the motions, and the Court’s review of recent  
4 decisions issued by the Nevada Supreme Court, the Court is fairly convinced Defendants’  
5 motions to dismiss will likely be granted— regardless of which repose period applies.

6 Nevada’s statute of repose for construction-defect claims is defined by NRS 11.202.  
7 *Donnelly v. Anthony & Sylvan Pools Corp.*, 134 Nev. 932, 2018 WL 6818539 at \*1  
8 (December 21, 2018). NRS 11.202 covers all claims against a construction contractor for  
9 any deficiency in “design, planning, supervision or observation of construction, or the  
10 construction of an improvement . . .” regardless of the name used for the claim. NRS §  
11 11.202(1); *Somersett*, 2021 WL 3237184, at \*1-2 n.4. Prior to 2015, the deadline for the  
12 statute of repose for construction claims “ranged from 6 to 12 years” after the date of  
13 substantial completion, depending on the defect. *Byrne v. Sunridge Builders, Inc.*, 475 P.3d  
14 38, 41 (Nev. 2020). However, the Nevada legislature amended the statute twice, which is  
15 relevant to this action.

16 First, on February 24, 2015, Nevada added a deadline to file a lawsuit against a  
17 construction entity of “6 years after the substantial completion” date of the construction  
18 project. NRS 11.202(1) (2015) (amended 2019). “The Nevada legislature provided that this  
19 version of NRS 11.202 applies retroactively to actions in which the substantial completion  
20 of the improvement to the real property occurred before the effective date [February 24,  
21 2015] of this act and incorporated a one-year grace period to commence an action.” *Lopez*  
22 *v. U.S. Home Corp.*, No. 2:16-cv-01754-GMN-CWH, 2016 WL 6988486 at \*3 (D. Nev. Nov.  
23 27, 2016) (internal quotation omitted). Assuming substantial completion of the project  
24 occurred in February 2012, if the 6-year statute of repose is applied Urban’s claims, these  
25 claims should have been filed no later than February 2018. However, Urban did not file its  
26 claims until March 2021—several years after the 6-year period expired. Thus, under the 6-  
27 year statute of repose, it would appear Urban’s claims are subject to dismissal.



1           However, on October 1, 2019, the legislature further amended NRS 11.202 to replace  
2 the 6-year requirement with a longer 10-year deadline instead. NRS § 11.202(1) (2019).  
3 Although the 2019 amendment also contains a retroactivity clause, the Nevada Supreme  
4 Court recently indicated that it has not yet determined whether the 10-year period contained  
5 applies retroactively and left resolution of this issue in a recent opinion. *See Somersett*, 2021  
6 WL 3237184, at \*1-2 n.3 (“Retroactive effect of 2019 version [statute of repose] was not a  
7 matter briefed by SOA” and thus 2015 version applied to case).

8           Moreover, in this case, retroactive application of the 2019 amendment presents a far  
9 more complex issue. Here, under the 2015 amendments, Urban’s claims were extinguished  
10 in 2018. If the 2019 amendment applies retroactively to Urban’s claims, it would effectively  
11 revive claims that were previously extinguished prior to the enactment of the recent  
12 amendment. Courts are divided on this issue. At this point, the Nevada Supreme Court nor  
13 the Ninth Circuit Court of Appeals has ruled on whether the most recently amended statute  
14 can revive claims that were “extinguished” by the tolling of the previous statute of repose.

15           Most courts that have addressed this issue have determined that revival of an  
16 extinguished claim under these circumstances would violate a defendant’s due process  
17 rights. *See, e.g., Harding v. K.C. Wall Prod., Inc.*, 250 Kan. 655, 669 (1992) (“The legislature  
18 *cannot* revive a cause of action barred by a statute of repose, as such action would  
19 constitute the taking of property without due process.”) (emphasis in original); *Catholic*  
20 *Bishop of N. Alaska v. Does 1-6*, 141 P.3d 719, 725 (Alaska 2006) (“Had the legislature  
21 intended to revive time-barred civil claims, it would have explicitly stated so.”) If the District  
22 Court agrees with these courts, it again appears all or most of Urban’s claims—whether in  
23 the current complaint or proposed amended complaint—would be subject to dismissal.

24           The undersigned recognizes that the District Court may disagree and find that  
25 dismissal is not proper. However, based on the undersigned’s review of the motions,  
26 statutes, and caselaw, this Court is fairly convinced that Defendants’ motions to dismiss are  
27 likely to be granted.

1 Based on the above analysis and review, the Court finds that each of the *Tradebay*  
2 factors supports staying discovery and, therefore, Defendants' Motion to Stay Discovery  
3 should be granted.

4 **IV. CONCLUSION**

5 Accordingly, the motion to stay (ECF No. 31) is **GRANTED**.

6 Discovery will be stayed until a ruling is made on the motions to dismiss.

7 **IT IS SO ORDERED.**

8 **DATED:** August 13, 2021.

9   
10 **UNITED STATES MAGISTRATE JUDGE**